



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 9, 2003

Mr. James M. Frazier, III  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342

OR2003-0187

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#174749.

The Texas Department of Criminal Justice (the "department") received a request for the full report concerning the death of the requestor's son, an inmate. You state that "basic information" regarding the incident has been or will be released to the requestor. You contend, however, that the remaining requested information is excepted from disclosure under sections 552.108, 552.117, and 552.134 of the Government Code. We have considered the exceptions that you claim and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the department received the present request for information on October 15, 2002. The department did not submit copies of the requested information to this office until November 6, 2002. Consequently, the department failed to comply with the requirements of section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You contend that the submitted information is excepted under sections 552.108, 552.117, and 552.134 of the Government Code. However, you have not demonstrated a compelling reason for withholding this information under section 552.108. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived); *but see* Open Records Decision No. 586 (1991) (when a governmental body fails to timely seek an attorney general decision under the Public Information Act, the need of another governmental body may provide a compelling reason for withholding the requested information). As sections 552.117 and 552.134 can provide compelling reasons to overcome the presumption of openness, we will address your arguments under those exceptions. *See* Open Records Decision No. 150 (1976) (confidentiality provisions and exceptions designed to protect the interests of third parties can provide compelling reasons for overcoming presumption of openness).

At the outset, we note that among the records you submitted to this office are "medical records," the release of which is governed by the Medical Practice Act (the "MPA"), Occ. Code § 151.001 *et. seq.* Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.004. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone

under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370(1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Medical records may be released only as provided under the MPA. We have marked the documents that consist of medical records because they were created by a physician or under the supervision of a physician and are therefore subject to the MPA. As the patient is now deceased, these records may be released only on the signed consent of the deceased’s personal representative. Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004,.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The information we have marked as subject to the MPA may be released only in accordance with the MPA.

We also note that the submitted records contain information the release of which may be governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the records that the department may release only in accordance with the access provisions of chapter 611, provided that the records were created by a professional as defined by the statute. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

The submitted information also contains a dental record. Section 258.102 of the Occupations Code provides in pertinent part as follows:

The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. Occ. Code § 285.101(1). We have marked a document created by a dentist which relates to the history or treatment of the patient. The department must withhold the marked document under section 552.101 in conjunction with section 285.102 of the Occupations Code.

You also raise section 552.117 of the Government Code, which excepts from disclosure the home address, home telephone number, or social security number of an employee of the department, as well as any information that reveals whether an employee of the department has family members, regardless of whether the employee complies with section 552.024. *See* Gov't Code § 552.117(3). Therefore, in releasing the responsive information, the department must withhold the marked information relating to an employee of the department that is excepted from disclosure under section 552.117(3).

Section 552.134 of the Government Code relates to information about inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Section 552.029 states:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

....

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Gov't Code § 552.029(8). Section 552.134 is explicitly made subject to section 552.029. Under section 552.029, basic information regarding the death of an inmate in custody, an alleged crime involving an inmate, and an incident involving the use of force is subject to required disclosure. The majority of the requested documents relate to the death of an inmate in custody. Accordingly, while the department must withhold most of the submitted documents under section 552.134, it must release basic information regarding the incident involving the death of an inmate in custody pursuant to section 552.029(8). Basic

information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident.

Lastly, we note that you submitted to this office an "Investigator's Report of Custodial Death." Article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the Office of the Attorney General, who "shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party." In Open Records Decision No. 521 at 5 (1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, Part I of custodial death reports filed with this office is public information. All remaining portions of the custodial death report, i.e., Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. *Id.*

Because the submitted report is not the form devised by the Office of the Attorney General to report custodial deaths, it is not clear that the "Investigator's Report of Custodial Death" you submitted to this office was intended to serve as the "custodial death report" required to be submitted to the Office of the Attorney General in compliance with section 49.18 of the Code of Criminal Procedure. *See* Code Crim. Proc. art. 49.18(c) (department required to submit custodial death report except where inmate died of natural causes or was lawfully executed, as provided by Gov't Code § 501.055(b)). If the submitted report was intended to serve as the custodial death report required by section 49.18 of the Code of Criminal Procedure, the department must release to the requestor all information required to be submitted to the Office of the Attorney General under Part I of the custodial death report.<sup>1</sup> If the submitted form was not intended to serve as the custodial death report required by section 49.18 of the Code of Criminal Procedure, the department may withhold the entire report under section 552.134.

In summary, the department must withhold most of the submitted information under section 552.134, as well as the information that we have marked under section 552.117. The department must also withhold the information we have marked under section 285.102 of the Occupations Code. The department may release the medical records we have marked with blue flags only in accordance with the MPA, and the marked mental health records only in accordance with the access provisions of chapter 611 of the Health and Safety Code, provided that the records were created by a professional as defined by the statute. The department must release basic information regarding the death of an inmate in custody pursuant to section 552.029(8), along with the information that we have marked with green flags that is not excepted under section 552.134. Lastly, depending on what the submitted

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<sup>1</sup>Open Records Decision No. 521 (1989) specifies the type of information contained in Part I of the custodial death report.

Investigator's Report of Custodial Death was intended to serve as, the department must release the information required to be submitted in Part I of a custodial death report, or the department may withhold the entire report under section 552.134.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/sdk

Ref: ID# 174749

Enc: Submitted documents

c: Mr. Gilbert Cardwell  
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(w/o enclosures)